No. 98-791

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

J. DANIEL KIMEL, JR., *et al.*,
Petitioners,

v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Just last week, the Second Circuit rejected the analysis of the decision below in this case, with the result that there now are eight circuits that have concluded that Congress permissibly abrogated the States' Eleventh Amendment immunity from suits by private plaintiffs in federal court under the Age Discrimination in Employment Act ("ADEA"), while two circuits, including the court below, have held the opposite. *See Cooper v. New York State Office of Mental Health*, Nos. 97-9433, 97-9543, 97-9367, 1998 U.S. App. LEXIS 31725 (2d Cir. Dec. 23, 1998).

The two agencies of the State of Florida that are respondents in this case have not opposed the petitions for certiorari filed by the petitioners herein ("*Kimel* Petition") and by the Solicitor General (*United States v. Florida*

Board of Regents, et al., No. 98-796 ("Government Petition")). Rather, those respondents have filed a waiver, accompanied by a letter in which "[r]espondents acknowledge that the decision of the Eleventh Circuit . . . conflicts with the holdings of several other circuits with respect to respondents' Eleventh Amendment challenge to the [ADEA]." The Florida respondents state that they "leave it to the Court to decide" whether certiorari should be granted.

The other respondent in this case, the University of Montevallo ("the University") has seen fit to submit a Brief in Opposition, despite the fact that the University does not deny that there is a circuit conflict on both of the issues subsumed within the question presented here. Seeking to forestall review of the minority position adopted by the court below, the University argues that the circuit conflict on the question whether Congress adequately expressed an intent to abrogate the States' immunity from private suits in federal court under the ADEA is a matter that should be resolved by Congress rather than by this Court. *See* Brief in Opposition at 4-12. The University also suggests that the decision below does not present an appropriate vehicle to resolve the circuit conflict on the question whether Congress had the power under the Fourteenth Amendment to subject the States to such suits. *See id.* at 13-22.

For the following reasons, the University's arguments against review cannot withstand analysis, and certiorari should be granted in this case and in No. 98-796.

I. INTENT TO ABROGATE

The University argues that Congress "committed a series of errors" in undertaking to extend the coverage of the ADEA to the States, *see* Brief in Opposition at 6, and that "Congress should be allowed the opportunity to correct th[os]e errors," *id.* at 12. That attribution of error

is itself erroneous, as we note in the margin.[1] And in any case, the University does not suggest that there is any doubt that Congress intended to abrogate State immunity from ADEA suits; the "error" the University claims to have discovered is that Congress supposedly did not use the right words to accomplish what the University tacitly concedes was a clear intent to abrogate. But the question whether Congress is required to express its intent with the excruciating clarity demanded by the University is precisely the question to be decided on the merits. And this is a question that has deeply split the circuits: two decisions hold that Congress did not sufficiently express in the ADEA its intent to abrogate the States' immunity, while every other circuit that has considered the question has held the opposite. *See Kimel* Petition at 6-8; Government

[1] The University asserts that when Congress extended the ADEA to the States in 1974, it failed to take heed of the decision in *Employees of the Dep't of Pub. Health & Welfare v. Missouri*, 411 U.S. 279 (1973), in which this Court held that the 1966 amendments to the Fair Labor Standards Act ("FLSA") had not clearly evinced an intent to abrogate State immunity. *See* Brief in Opposition at 4-5, 7, 11. That is not so. *See Cooper*, 1998 U.S. App. LEXIS at *8-*19. In the 1974 amendments, Congress responded to the decision in *Employees* by revising the enforcement provisons of the FLSA, *which are expressly incorporated by the ADEA*, *see* 29 U.S.C. § 626(b), to provide that private suits may be brought against "employers (*including a public agency*) in any *Federal* or State court of competent jurisdiction." 29 U.S.C. § 216(b), as amended by Pub. L. 93-259 (effective May 11, 1974) (emphasis added). *See* H. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2811, 2850 (noting that this "amendment is necessitated by the decision of the U.S. Supreme Court in [*Employees*]").

The other "error" cited by the University is that Congress did not recite that the extension of the ADEA to the States was an exercise of Congress's power under the Fourteenth Amendment. *See* Brief in Opposition at 6, 10, 11. But, as this Court noted when it last considered the application of the ADEA to the States, "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

Petition at 8-9; *Cooper*, 1998 U.S. App. LEXIS at *12-*13.

This square conflict, with the resultant lack of uniformity in the enforcement of this important federal statute, should be resolved by this Court. It is not a matter that Congress should be expected to address, particularly where all but two of the circuits that have considered the issue have held that Congress already has expressed with sufficient clarity in the ADEA its intent to abrogate State immunity.

II. FOURTEENTH AMENDMENT POWER

The University asserts that the question whether, under *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress had the power under Section 5 of the Fourteenth Amendment to require the States to abide by the provisions of the ADEA is "Not Among the Questions Presented by the Petitions." Brief in Opposition at 13. The University also debates whether the division in the circuits on that question is an intractable one, *id.* at 15-19, and suggests that this case is not appropriate for review because it involves claims of retaliation and disparate impact in addition to claims of intentional age discrimination, *id.* at 19-22. These efforts at avoidance are unavailing.

a. We explained at length in the petition, and the University does not dispute, that the question whether Congress had authority under the Fourteenth Amendment to extend the ADEA to the States is a necessary part of the question presented by our petition. *See Kimel* Petition at 4, 5-6, 9-12. And the United States' petition lists the Fourteenth Amendment question as a distinct question presented. *See* Government Petition at (i). It therefore is difficult to fathom how the University can assert that the Fourteenth Amendment issue is "virtually invisible in the questions presented by the petitions." Brief in Opposition at 14.

As for the University's suggestion that the question of Congress's authority to enact the ADEA under its Four-

teenth Amendment power "should be taken up in a case in which it is the only issue, unencumbered by any abrogation questions," *id.* at 14, the short response is that such a case will never arise. Where no issue of Eleventh Amendment immunity is presented in an ADEA suit, the question of Congress's authority under the Fourteenth Amendment simply does not arise, because Congress's *Commerce Clause* power is sufficient to sustain the enforceability of the ADEA in such cases. *See EEOC v. Wyoming*, 460 U.S. 226 (1983). Thus, the Fourteenth Amendment question arises *only* in cases that are, as the University puts it, "[]encumbered by" Eleventh Amendment immunity issues—issues that are themselves of great consequence.

b. There is no denying that, in the wake of *Boerne*, the Circuits have split 6-2 on the question whether the application of the ADEA to the States can be sustained under Congress's power to enforce the Fourteenth Amendment. *See Kimel* Petition at 9-10; Government Petition at 10; Brief in Opposition at 17-18; *Cooper*, 1998 U.S. App. LEXIS at *20.[2] Any suggestion that the conflicting decisions have not given full consideration to this issue is belied by the decisions themselves. *See Kimel* Petition at 10-12. The University notes that some of the post-*Boerne* decisions upholding Congress's authority arose in circuits that had reached the same result pre-*Boerne*. *See* Brief in Opposition at 17. But, in reaffirming their prior decisions, those courts carefully considered *Boerne*; they simply did not find in that decision the precedent-shattering implications discerned by the University and by Judge Cox below.[3] And even if the University were correct in at-

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[2] If pre-*Boerne* decisions are included, the split is 8-2. *See Kimel* Petition at 10; Government Petition at 10 n.4.

[3] Of the eight post-*Boerne* decisions we have cited, all but one contain explicit discussions of *Boerne*. The one exception, *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1988), analyzes in detail why the ADEA satisfies the standard of *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See* 150 F.3d at 1057-58. That standard, as applied in *Keeton*, remains good law after *Boerne*. *See Boerne*, 521 U.S. at ——, 117 S.Ct. at 2163.

tributing some of the decisions it dislikes to "the magnetic pull of the Circuit precedent rule," Brief in Opposition at 17, the division in the circuits that has arisen on this issue is none the less real, and can only be resolved by this Court.

c. The University suggests that even if Congress has authority under the Fourteenth Amendment to prohibit intentional age discrimination by the States, the ADEA still might exceed Congress's Fourteenth Amendment power to the extent that the statute establishes causes of action for retaliation and disparate impact. *See* Brief in Opposition at 19-20. However, the three cases that are the subject of the certiorari petition all present claims of intentional age discrimination asserted againt a State by a private party. The question whether federal court jurisdiction extends to such claims is squarely presented; and if that question is decided in petitioners' favor, the decisions below will be reversed.

This is an appropriate case to resolve the deep circuit split on the important question whether *any* claims under the ADEA may be pursued against a State by private plaintiffs in federal court. The suggestion that claims based on retaliation or disparate impact may call for special analysis is a nuance that could be considered by the Court in its decision of these cases, or left for further consideration on remand.[4]

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[4] As the United States has observed, resolution of the question presented here may shed light on how similar issues that are being actively litigated under other federal employment laws should be resolved. *See* Government Petition at 12-13. The University proposes that the Court should wait for a case under *Title VII* that challenges the scope of Congress's Fourteenth Amendment authority. *See* Brief in Opposition at 21-22. That suggestion has no merit: the ADEA is a vitally important statute in its own right, and a circuit split that fundamentally affects the enforcement of the ADEA plainly warrants this Court's review. What is more, there are as yet no court of appeals decisions on the Title VII issue posited by the University, and it does not appear that the States as litigants are reading *Boerne* as casting doubt on the enforceability of Title VII in any respect. This Court should not leave unresolved the circuit split that has developed under the ADEA in order to wait for cases presenting Title VII issues that have not arisen and may never arise.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petitions, this Court should grant the petitions for certiorari in this case and in No. 98-796.

Respectfully submitted,

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